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NO. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
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Alexander L. Stevas, Clerk

ORIGINAL

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED

Whether the Supreme Court of Florida denied petitioner the right to due process under the Fourteenth Amendment by arbitrarily disregarding, in its review of petitioner's conviction and sentence, three established state law protections routinely afforded to all defendants who seek appellate review of capital cases in Florida?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

OPINIONS BELOW

The order of the Florida Supreme Court summarily denying Jeffery Joseph Daugherty's petition for a writ of habeas corpus is reproduced in the Appendix at A-1.* The opinion of the Florida Supreme Court affirming Mr. Daugherty's sentence of death is reported at 419 So.2d 1067 (Fla. 1982). This Court's denial of Mr. Daugherty's petition

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* Page references to the Appendix to this Petition are cited as "A- ."

for a writ of certiorari to the Supreme Court of Florida to review the decision on direct appeal is reported at 103 S.Ct. 1236 (1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Florida Supreme Court was set forth in its order entered on November 15, 1983. A-1. This petition for certiorari was filed within 90 days of that date pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Florida Statutes Annotated Section 921.141. Those provisions are set forth in the Appendix at A-2.

PRELIMINARY STATEMENT

The Florida Supreme Court's summary denial* of the petition for a writ of habeas corpus below raises an important

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* Florida Rule of Appellate Procedure 9.100(f) provides in pertinent part:

> If the petition [for habeas corpus] demonstrates a preliminary basis for relief [or] a departure from the essential requirements of law, . . . the court may issue an order directing the respondent

[Footnote continues]

question of federal constitutional law concerning the extent to which the denial of state-created procedural rights to specific capital sentencing protections implicates the Due Process Clause of the Fourteenth Amendment.

In the wake of Furman v. Georgia, 408 U.S. 238 (1972), and its Florida counterpart, Donaldson v. Sack, 265 So.2d 499 (1972), the State of Florida adopted a new capital punishment scheme that provided for automatic appellate review by the Florida Supreme Court. That statute, however, did not prescribe the specific form of appellate review that the Florida Supreme Court was to undertake. In order to define a meaningful role in the Florida scheme -- and thereby to minimize the possibility of arbitrary and capricious executions under Florida law -- the Supreme Court of Florida in turn adopted certain procedures for the review of all capital cases in Florida.

In this case, the Florida Supreme Court disregarded these procedures in three important respects. First, the Florida Supreme Court failed to conduct any proportionality review of petitioner's death sentence, either on direct appeal or during the habeas corpus proceeding which specifically sought such review. Second, the Florida Supreme Court failed to conduct an independent reweighing of the statutory circumstances to determine whether the death sentence is genuinely

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[Footnote continued]

> to show cause, within the time set by the court, why relief should not be granted.

The Florida Supreme Court issued no such order in this case, and thus denied the petition without requiring a a response from the State.

supportable in this case. Third, the Florida Supreme Court failed to have before it and review the entire record on which the lower court based its decision to sentence Mr. Daugherty to death. It thus arbitrarily denied petitioner the procedural safeguards afforded other capital defendants in Florida.

Petitioner does not contend herein that the denial of any one of the above-delineated protections alone necessarily constitutes an Eighth Amendment violation.* In fact, this Court has recently declared that an appellate proportionality review in all death penalty cases is not mandated by the Eighth Amendment. Pulley v. Harris, 52 U.S.L.W. 4141 (U.S. January 24, 1984) (No. 82-1095). Florida, however, has chosen to provide capital defendants a right to proportionality review, as well as other protections not specifically mandated by the Eighth Amendment.

Thus, the instant case is entirely distinguishable from Pulley. The question presented here is not whether an individual can constitutionally be put to death under a state statutory scheme which does not provide for proportionality review. Rather, the question is whether a state that chooses to provide specific and substantial protections in the death penalty process can constitutionally execute a particular defendant who has been arbitrarily denied the protections afforded all other capital defendants in that state.

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* However, petitioner does not concede that the Florida capital punishment scheme would survive Eighth Amendment challenge in the absence of the three, state-created protections arbitrarily denied petitioner in this case. That issue was presented below in petitioner's habeas corpus petition, and rejected.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

On November 18, 1980, Jeffery Joseph Daugherty pleaded guilty to five separate counts in connection with the death of Patricia Lavonne Sailer: first degree premeditated murder, first degree felony murder (robbery), first degree felony murder (kidnapping), robbery and kidnapping. On the same day, the lower court commenced an evidentiary hearing pursuant to Florida Statutes Annotated Section 921.141(1) to determine whether petitioner should be sentenced to death or life imprisonment.

On November 20, 1980, a majority of the advisory jury recommended the death penalty on each of the three counts of murder. On April 27, 1981, the court imposed the death penalty for first degree murder. In its Order of Judgment and Sentence, R-311,* the court expressly stated that it had considered the presentence investigation report, the evidence from the hearing and the arguments of counsel in finding two aggravating circumstances. The court further stated that it had "weigh[ed] the aggravating and mitigating circumstances" in reaching its conclusion that "there are sufficient aggravating circumstances . . . and insufficient mitigating circumstances" to justify the death penalty in this case. R-314.

B. Proceedings in the Florida Supreme Court on Direct Appeal

On May 28, 1981, petitioner directly appealed his death sentence to the Florida Supreme Court pursuant to the

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* The rcord on appeal to the Florida Supreme Court is designated by an "R- ."

automatic review provision of Florida Statutes Annotated Section 921.141(4). The lower court, however, did not transmit the entire record of the sentencing proceeding to the Florida Supreme Court. Nevertheless, on September 14, 1982, the Florida Supreme Court affirmed petitioner's death sentence, Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982), on the basis of a record that did not include (1) the trial court's sentencing instructions to the jury, (2) the arguments of counsel, (3) the jury voir dire and (4) petitioner's taped confession which was played at the evidentiary hearing.

On September 23, 1982, petitioner filed a timely motion for additional time in which to move for rehearing.* Petitioner raised, among other issues, the fact that the Florida Supreme Court did not have the entire record of the sentencing proceeding before it on direct appeal and that one or more of the convictions upon which the lower court found an aggravating circumstance had been reversed. Petitioner also raised the possibility of errors in the charge to the sentencing jury, which was not part of the record on direct appeal. The Florida Supreme Court denied the motion for additional time on September 30, 1982, by which date petitioner's initial time to move for rehearing had elapsed.

C. Proceedings in the U.S. Supreme Court Following the Florida Supreme Court's Decision on Direct Appeal

The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court and Circuit Justice for the

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* Petitioner's appointed counsel below withdrew from this case prior to the issuance of the Florida Supreme Court's judgment. Present counsel, having first appeared in connection with the motion for additional time, was formally retained on September 30, 1982.

Eleventh Circuit, granted an extension of time to file a petition for a writ of certiorari. On December 13, 1982, petitioner filed a petition for a writ of certiorari. This Court denied that petition on February 22, 1983, with Justices Brennan and Marshall dissenting. Daugherty, 103 S.Ct. 1236 (1983).

D. Habeas Corpus Proceedings in the Florida Supreme Court

On November 8, 1983, petitioner filed a petition for a writ of habeas corpus with the Florida Supreme Court pursuant to its original jurisdiction. Petitioner raised and fully briefed the issues presented herein concerning the Florida Supreme Court's failure to conduct any proportionality review, failure to conduct an independent reweighing of the statutory circumstances and failure to review the entire record on which the lower court sentenced petitioner to death. The petition was summarily denied by the Florida Supreme Court on November 15, 1983.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT DENIED PETITIONER THE RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY DISREGARDING ESTABLISHED STATE LAW PROTECTIONS FOR APPELLATE REVIEW OF CAPITAL CASES IN FLORIDA.

In response to Furman, the legislature of the State of Florida provided a number of specific safegaurds in the prosecution of all capital cases, including an automatic review by the Florida Supreme Court of both the underlying convictions and the resulting capital sentence. Fla. Stat.

Ann. § 921.141. In its first decision under the new death penalty statute, the Florida Supreme Court articulated specific procedures by which it would conduct its mandatory appellate review. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied sub nom., Hunter v. Florida, 416 U.S. 943 (1974). By the time this Court considered the constitutionality of Florida's new death penalty statute, these appellate procedures were so established in the decisions of the Florida Supreme Court that this Court recognized them as an integral part of the Florida death penalty scheme. Proffitt v. Florida, 428 U.S. 242, 251-53 (1976). See Pulley, 52 U.S.L.W. at 4143-4144 n.8 (proportionality review). Thus, when petitioner decided to plead guilty, he could reasonably expect that he would not be sentenced to death without full recourse to the procedural safeguards well-established by the Florida Supreme Court even before Proffitt.

In this case, Mr. Daugherty's reasonable expectations were not fulfilled. Rather, the Florida Supreme Court affirmed his sentence of death without engaging in at least three of the procedures it had adopted for review of all death penalty cases: (1) the Florida Supreme Court did not conduct a proportionality review to ensure that the disposition of this case was consistent with the dispositions of other capital cases; (2) it did not reweigh the evidence of aggravating and mitigating circumstances and make an independent determination that the evidence supports the imposition of the death penalty; and (3) it did not review the entire record on which the lower court based its decision to sentence petitioner to death. Under these circumstances, the Florida

Supreme Court denied petitioner state-created procedural rights, and in so doing, transgressed the Due Process Clause of the Fourteenth Amendment.

A. The Supreme Court of Florida Denied Petitioner State-Created Rights to Certain Specific Procedures for Appellate Review of All Capital Cases.

1. Proportionality Review

This Court in Proffitt expressly observed that, under the Florida death penalty scheme, "[the] decisions [of the lower court] are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances." Proffitt, 428 U.S. at 253. This Court then concluded that, "[b]y following this procedure[,] the Florida [Supreme] [C]ourt has in effect adopted [a] type of proportionality review . . . ." Proffitt, 428 U.S. at 259. See also Pulley, 52 U.S.L.W. at 4143-44 n.8.

This conclusion is solidly grounded in numerous decisions of the Florida Supreme Court both prior to, and since, Proffitt. In Menendez v. State, 419 So.2d 312 (Fla. 1982), the Florida Supreme Court stated that its "function in reviewing a death sentence is to consider the circumstances in light of . . . other decisions and determine whether the death penalty is appropriate." Id. at 315 (citing State v. Dixon, 283 So.2d 1). In Jacobs v. State, 396 So.2d 1113 (Fla.), cert. denied, 454 U.S. 933 (1981), the Florida Supreme Court acknowledged its "responsibility to review the judgment and sentence imposed upon defendant in light of other decisions and determine whether the punishment is too great." Id. at 1117. See also Raulerson v. State, 358 So.2d 826,

834 (Fla.), cert. denied, 439 U.S. 959 (1978); State v. Dixon, 283 So.2d at 10.

In Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981), the Florida Supreme Court stated that one aspect of its review process was "to ensure relative proportionality among death sentences which have been approved statewide." Id. at 1331. It described this aspect as a "compar[ison of] the case under review with all past capital cases to determine whether or not the punishment is too great." Id. at 1331 (citing Proffitt, 428 U.S. 242 and State v. Dixon, 283 So.2d 1) (emphasis added). And in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), the Florida Supreme Court declared: "It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great." Id. at 540 (citing State v. Dixon, 283 So.2d 1).

In Goode v. State, 365 So.2d 381 (Fla. 1978), cert. denied, 441 U.S. 967 (1979), the Florida Supreme Court more specifically "compar[ed] the aggravating and mitigating circumstances with those shown in other capital cases . . ." Id. at 384. And in McCray v. State, 416 So.2d 804 (Fla. 1982), the Florida Supreme Court held that, "[g]iven the circumstances of this case, . . . a life sentence was not unreasonable and, in fact, is consistent with [the dispositions of other cases under] similar circumstances." Id. at 808 (citing illustrative cases).

At the heart of the somewhat abstract notion of "proportionality" is the basic concept of equality under the

law. The Florida Supreme Court has acknowledged that it is "extremely sensitive to the demands of equality before the law in cases in which [it] must consider whether a sentence of death should be upheld." Meeks v. State, 339 So.2d 186, 192 (Fla. 1976), cert. denied, 439 U.S. 991 (1978). As the court declared in Slater v. State, 316 So.2d 539 (Fla. 1975): "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." Id. at 542 (holding that "[t]he imposition of the death sentence in [the case before it] is clearly not equal justice under the law."). See also Jackson v. State, 366 So.2d 752, 757 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

Thus the proportionality review evolved in the decisions of the Florida Supreme Court. In State v. Dixon, 283 So.2d 1, the court proclaimed: "Review by this [c]ourt guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 10 (emphasis added). That guarantee has not been hollow. As the Florida Supreme Court said in Brown, 392 So.2d 1327, "[i]n those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment." Id. at 1331 (citing Malloy v. State, 382 So.2d 1190 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976)) (emphasis added). Thus, the proportionality review has made the difference between life and death for some inmates of the Florida penal system who in fact received such review.

As the opinion on direct appeal fails to articulate any proportionality considerations, and is devoid of any citations to comparable death penalty cases, it cannot reasonably be presumed that proportionality review was in fact conducted in this case.* It is no answer simply to surmise that the Florida Supreme Court conducted such a review sub silentio. Due process cannot countenance such blithe assumptions. Having chosen to confer a right to a specific appellate procedure to which federal due process rights attach, Florida cannot through silence preclude federal review by refusing to articulate the fact and manner of its performance of that procedure.

2. Independent Determination

The Florida Supreme Court also has assumed the responsibility of making an independent determination as to whether the evidence is sufficient to warrant the imposition of the death penalty. In Goode v. State, 365 So.2d 381, the Florida Supreme Court stated: " . . . [after] weighing the evidence in the case . . ., our judgment is that death is the proper sentence." Id. at 385. In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court recognized that "[it] must . . . determine independently whether under all the circumstances the death penalty was appropriate punishment. . . ." Id. at 1000 (emphasis added).

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* Notwithstanding this Court's recent dictum in Pulley, 52 U.S.L.W. at 4144 n.8, petitioner does not understand this Court to have ever squarely addressed the constitutionality of Florida's purported right to conduct an integral aspect of its appellate review in silence. Certainly the issue was neither presented nor briefed in Pulley where the California Supreme Court expressly disclaimed an obligation to conduct any proportionality review under that state's capital punishment statute.

In Jacobs v. State, 396 So.2d 1113, the Florida Supreme Court stated: "We have carefully reviewed the record . . . and it is our opinion that the [statutory] circumstances are such that the infliction of capital punishment is warranted." Id. at 1120. In Neary v. State, 384 So.2d 881 (Fla. 1980), the Florida Supreme Court announced: "It is our duty to examine the record in this cause and determine whether there are clear and convincing facts that warrant the imposition of the death penalty over . . . life imprisonment." Id. at 885. Neary demonstrates that this independent review is by no means perfunctory. In that case, the Florida Supreme Court reversed the death sentence after reevaluating the weight to be afforded the following mitigating circumstances: (1) the defendant was young (18 years old); (2) the case against the co-defendant had been dismissed on a motion for a directed verdict; (3) the defendant was a slow learner; and (4) the defendant grew up without a father.* Id. at 885-87.

In two other cases, the Florida Supreme Court was quite explicit about its function in reviewing death sentences. In Raulerson v. State, 358 So.2d 826, the Florida Supreme Court announced that, "[i]n reviewing the [statutory] circumstances, the nature of the murder and the circumstances under which it was committed, we hold that the aggravating

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* The instant case involves strikingly similar mitigating circumstances to Neary: (1) petitioner was completely abandoned by his mother at the age of two and seldom lived in the same household with his father; (2) he was beaten and abused at an early age; (3) he moved frequently as a child, changing schools numerous times before dropping out of school during the tenth grade; (4) he was 20 years old at the time of the offense; and (5) neither of his two substantially older co-participants was formally charged for the crime for which Mr. Daugherty now stands sentenced to die.

circumstances outweigh the mitigating circumstances and the penalty of death is the proper sentence." Id. at 835. See also Jackson v. State, 366 So.2d at 758. ("We find that the aggravating factors outweigh those in mitigation . . . ."). And in Halliwell v. State, 323 So.2d 557 (Fla. 1975), the Florida Supreme Court followed the same procedure, but overturned the death sentence, stating: ". . . we have weighed both the aggravating and the mitigating circumstances as shown in the record, and we conclude that the death penalty is not warranted." Id. at 561.

In upholding the constitutionality of the Florida death penalty statue, this Court examined the reviewing process adopted by the Florida Supreme Court in numerous state cases, and accepted that, in practice, that court fulfilled the meaningful supervisory role it purported to serve. The very essence of the Florida appellate review system was the assurance that "the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Proffitt, 428 U.S. at 253 (quoting Songer v. State, 322 So.2d 481, 484 (Fla. 1975)).

That the independent reweighing process assumed by the Florida Supreme Court lies at the very core of the Florida death penalty scheme was recently underscored by this Court in Goode v. Wainwright, 52 U.S.L.W. 3419 (U.S. November 28, 1983) (No. 83-131). In Goode, the Court of Appeals reversed a denial of a petition for a writ of habeas corpus on the ground that the trial judge improperly considered a non-statutory aggravating circumstance -- future dangerousness --

in sentencing petitioner to death. In reversing the Court of Appeals, this Court concluded:

> Even if the Court of Appeals had been correct in concluding that the sentencing judge had relied on a factor unavailable to him under state law, it erred in reversing the district court's dismissal of Goode's habeas petition. . . . Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [the petitioner's] future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id. at 3421 (emphasis added).

As is evident by this Court's disposition of Goode, the Florida Supreme Court's de novo weighing of the aggravating and mitigating circumstances can provide a rational basis for imposition of the death penalty, even where the sentencing court itself may well have been influenced by an element of capriciousness. The necessary corollary of attributing such significance to the independent reweighing process is that, without such an independent and thorough review, there is no sound basis for concluding that the State has fulfilled its responsibility to minimize to the greatest extent feasible the possibility of an arbitrary and capricious sentencing determination. See Proffitt, 428 U.S. at 253.

In the instant case, the Florida Supreme Court clearly shirked its responsibility to perform an independent reweighing of the aggravating and mitigating circumstances. Rather than making such an independent determination of the propriety of sentencing petitioner to death, the Florida Supreme Court simply assessed whether the lower court's findings on the issues raised by appellate counsel were

"supported by the record." Daugherty v. State, 419 So.2d at 1071. Rather than reviewing or reweighing the evidence of aggravating and mitigating circumstances, it expressly deferred to "the province of the trial court to decide whether a particular [statutory] circumstance has been proven and the weight to be given it." Id. Thus, it is evident that, by purporting to do no more than check for error and, finding none, affirming petitioner's death sentence, the Florida Supreme Court failed to afford petitioner the kind of appellate review which it has routinely afforded other capital defendants.

3. Entire Record

The Florida death penalty statute, in response to Furman, expressly provides that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record . . . ." Fla. Stat. Ann. § 921.141(4) (West Supp. 1983) (emphasis added). In interpreting this statute, the Florida Supreme Court unequivocally stated: "We construe that terminology to require a full record review for trial error and a determination of the sufficiency of the evidence, as well as the appropriateness of the imposition of the death sentence." Combs v. State, 403 So.2d 418, 422 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (emphasis added). Thus, the Florida Supreme Court has found a statutory right in all death penalty cases to a tripartite review of the entire record that consists of: (1) a review for trial error; (2) a review of the sufficiency of the evidence; and (3) a review of the appropriateness of the death sentence.

The Florida Supreme Court repeatedly has enforced this right. In Williams v. State, 386 So.2d 538 (Fla. 1980), the Florida Supreme Court stated: "As is our duty in death penalty cases, we have thoroughly examined the entire record in this case . . . ." Id. at 541 (emphasis added). Similarly, the Florida Supreme Court declared in Delap v. State, 350 So.2d 462 (Fla. 1977): "Our review is of the entire record of the conviction and the sentence of death." Id. at 463 n.1 (emphasis added). It immediately followed that pronouncement with a citation to the Florida death penalty statute, Fla. Stat. Ann. § 921.141. Id.

In Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 103 S.Ct. 317 (1982), the Florida Supreme Court affirmed a death sentence after "[h]aving reviewed the entire record." Id. at 1175 (emphasis added). And in Jackson v. State, 366 So.2d 752, the Florida Supreme Court announced that, "[a]fter careful review of the entire record, we affirm . . . the sentence." Id. at 753 (emphasis added).

In sentencing Mr. Daugherty to death, the lower court stated that it had "carefully consider[ed] and weigh[ed] the evidence presented during [the] plea and sentencing proceedings, the arguments of the attorneys as to the sentence to be imposed and the information contained in the Pre-sentence Investigation Report prepared by the Department of Corrections . . . ." R-311. However, in transmitting the record to the Florida Supreme Court for review on direct appeal, the lower court omitted (1) its sentencing instructions to the jury, (2) the arguments of counsel, (3) the jury voir dire and (4) petitioner's taped confession which

was played at the evidentiary hearing. As a result, the Florida Supreme Court did not even have -- let alone review -- the entire record on which the lower court relied in sentencing petitioner to death.

B. The State-Created Rights to Certain Procedures for Appellate Review of Capital Cases Invoke the Protections of the Due Process Clause of the Fourteenth Amendment.

As is evident from the preceding discussion, the Florida Supreme Court has adopted and utilized certain specific procedures for the review of capital cases. These established procedures, relied upon by this Court in upholding the Florida death statute, give rise to the legitimate interest in having the Florida Supreme Court follow them in every death penalty case. See Gardner v. Florida, 430 U.S. 349, 358 (1977). The failure to do so is not simply a matter of state law, but a denial of fundamental due process under the Fourteenth Amendment.

This Court has repeatedly held that "state statutes may create . . . interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones, 445 U.S. 480, 488 (1980). See also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Aldana v. Holub, 381 So.2d 231, 236 n.9 (Fla. 1980); Von Stephens v. School Board of Sarasota County, 338 So.2d 890, 894 (Fla. Dist. Ct. App. 1976). This means that, even where there is no constitutional right to certain procedures, a state may

create a "right or justifiable expectation" that those procedures are requisite to some adverse action. Vitek, 445 U.S. at 489; Montanye v. Haymes, 427 U.S. 236 (1976). See also Woodson v. North Carolina, 428 U.S. 280, 319 (1976) (Rehnquist, J., dissenting) ("If the states wish to undertake such an effort [e.g., proportionality review], they are undoubtedly free to do so, [even though] it is not required by the United States Constitution"), quoted in Pulley, 52 U.S.L.W. at 4144 n.11.

"Once a state has [created such a right], . . . due process protections are necessary 'to ensure that the state-created right is not arbitrarily abrogated.'" Vitek, 445 U.S. at 488-89 (quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1974)). See also Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Greenholtz, 442 U.S. at 12. As the Florida Supreme Court itself recognized, "[v]ital to the concept of procedural due process is the notion that valuable . . . interests, such as those conferred by state law, must not be 'arbitrarily undermined.'" Aldana, 381 So.2d at 236 n.9 (quoting Roth). See also Ragucci v. City of Plantation, 407 So.2d 932, 935 (Fla. Dist. Ct. App. 1981); Johnson v. School Board of Palm Beach County, 403 So.2d 520, 524 & n.6 (Fla. Dist. Ct. App. 1981); Von Stephens, 338 So.2d at 894-95.

Both the legislature of the State of Florida and the Florida Supreme Court have created in petitioner a legitimate expectation that he would not be sentenced to death without full recourse to the established procedures of the Florida Supreme Court. At the heart of this expectation is Mr. Daugherty's interest in life imprisonment over death.

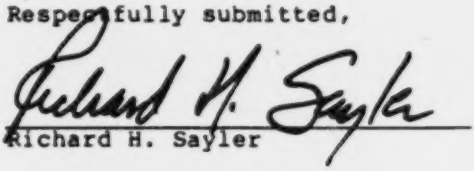
The "fundamental nature" of this interest places it well within the parameters of Fourteenth Amendment protection. See Roth, 408 U.S. at 570-71; Morrisey v. Brewer, 408 U.S. 471, 481 (1972). As this Court has observed: "'[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" Vitek, 445 U.S. at 492 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)). As it is hard to imagine a greater intrusion on Mr. Daugherty's personal security than Florida's calculated imposition of the death penalty, the Florida Supreme Court's failure in this case to follow its established standards and procedures for appellate review of all capital cases in Florida violates his right to due process under the Fourteenth Amendment.

CONCLUSION

For the reasons stated herein, Mr. Daugherty hereby requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court summarily denying his petition for a writ of habeas corpus.

Dated: February 13, 1984

Respectfully submitted,



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DONOVAN LEISURE NEWTON & IRVINE

Supreme Court of Florida

SUNDAY, NOVEMBER 13, 1983

JEFFREY JOSEPH DAUGHERTY,	**	
Petitioner,	**	CASE NO. 54,489
vs.	**	
LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,	**	
	**	
Respondent.	**	
	**	

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

A True Copy

Test:

Sid J. White
Clerk Supreme Court.

cc: Allan R. Freedman, Esquire
Richard M. Sayler, Esquire
and Daniel J. Thomasch, Esquire
Anthony P. Mario, Esquire
and Burton J. Green, Esquire
Hon. Jim Smith
Evelyn D. Golden, Esquire

Best Copy Available

should begin to run. *Casto* was decided after the district court's decision in *Grabarnick*.

We quash the decision of the district court dismissing the appeal as untimely and remand the cause for further consideration in accordance with the views expressed in *Casto* and this opinion.

It is so ordered.

BOYD, OVERTON and SUNDBERG, JJ., concur.

McDONALD, J., dissents with an opinion, with which ALDERMAN, C. J., concurs.

McDONALD, Justice, dissenting.

I dissent. We made a mistake in *Casto v. Casto*, 404 So.2d 1046 (Fla.1981), and this case gives us a vehicle to correct that error. The time for filing a petition for rehearing should commence to run when the judgment sought to be reheard is filed with the clerk of the court. The Third District Court of Appeal correctly dealt with this issue in *Dibble v. Dibble*, 377 So.2d 1001 (Fla.3d DCA 1979). We should adopt that opinion and dispose of this case accordingly.

ALDERMAN, C. J., concurs.

Jeffrey Joseph DAUGHERTY, Petitioner,

v.

STATE of Florida, Respondent.

No. 60709.

Supreme Court of Florida.

Sept. 14, 1982.

Defendant was convicted in the Circuit Court, Bravard County, J. William Woodson, Jr., of first-degree murder, and he appealed. The Supreme Court held that: (1) it was not error to permit State to introduce, in death penalty sentencing phase of capital murder prosecution, defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced; (2) evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity; and (3) record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

Affirmed.

1. Homicide ⇐354

It was not error to permit State to introduce in death penalty sentencing phase of capital murder prosecution defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced. West's F.S.A. § 921.141(5)(b).

2. Criminal Law ⇐986.2(4)

Evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity.

3. Homicide ⇐354

In sentencing phase of capital murder prosecution, record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's

participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

4. Homicide ⇐354

In sentencing phase of capital murder prosecution, it was not error to fail to find nonstatutory mitigating factors of defendant's claimed remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and defendant's ineligibility for parole for 107½ years.

5. Criminal Law ⇐1208(1)

It is within province of trial court to decide whether particular mitigating circumstance in sentencing has been proven and weight to be given it in determining whether to impose death penalty.

Arthur J. Kutsche, of the Law Offices of A. J. "Sonny" Kutsche, Titusville, for petitioner.

Jim Smith, Atty. Gen., and C. Michael Barnette, Asst. Atty. Gen., Daytona Beach, for respondent.

PER CURIAM.

Jeffrey Joseph Daugherty appeals his conviction and sentence of death for the first-degree murder of Lavonne Patricia Sailer. We affirm.

Daugherty, along with his girl friend Bonnie Heath and his uncle, left Michigan in January 1976 and traveled to Florida purportedly to look for jobs and to visit Heath's children. On February 23, 1976, he robbed an Easy Way food store and shot and killed Carmen Abrams and seriously wounded her husband. Continuing on a killing and robbing spree, on March 1, 1976, Daugherty and Heath picked up Lavonne Sailer who was hitchhiking in Melbourne, Florida. They took her to an isolated area near the Brevard County dump where Daugherty told her to get out of the car and robbed her. He then shot her five times at close range with a .22 caliber pistol. They then returned to the nearby bar to pick up Daugherty's uncle. Thereafter for a twenty-day period, Daugherty, along with Heath, continued on a course of robberies and murders, several of which he was convicted and for which he was sentenced prior to being convicted and sentenced for the Sailer murder.

Daugherty pled guilty to the first-degree murder, robbery, and kidnapping of Sailer. A jury was then impaneled for the sentencing phase. The jury recommended a sentence of death, and the judge imposed the death sentence for the first-degree murder and life sentences for the robbery and kidnapping. The trial court found as an aggravating factor that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. It enumerated the previous convictions as follows:

(1) The defendant was convicted and sentenced on July 31, 1980, for First Degree Murder in Flagler County, Fl. where he shot and killed a white female in her sixties by shooting her in her left shoulder and right temple during the course of robbing the victim.

(2) The defendant was sentenced on July 14, 1980, for the Murder of a white female by the name of Campbell whom he stabbed after he had robbed her place of business in Volusia County, Fl.

(3) The defendant was convicted and sentenced on September 29, 1978, for Criminal Homicide, Criminal Conspiracy, Robbery and crimes committed with firearms. The defendant robbed a gas station and in the process shot the young attendant twice in the side, once in the bridge of the nose and once under the chin.

(4) The defendant was convicted and sentenced on January 4, 1980, for Robbery, Aggravated Assault, Simple Assault and crimes committed with firearms. In Altoona, Pa. the defendant robbed a woman clerk at Rich's Music Store with a firearm and in the process assaulted the woman a number of times until she lost consciousness.

(5) The defendant was convicted and sentenced on September 29, 1978, in the State of Pennsylvania for the crimes of Simple Assault, Aggravated Assault, Burglary, Robbery and crimes committed with firearms.

(6) The defendant was convicted and sentenced on July 12, 1976, in the State of Virginia for Armed Robbery and using a firearm while committing a felony.

(7) The defendant was convicted and sentenced on January 4, 1980, for Criminal Conspiracy, Robbery and Criminal Homicide. The defendant robbed one Betty Shank at a Jack's Kwik-Mart in Blair County, Pa. and in the process killed the clerk by shooting her in the body and head.

The trial court also found as an aggravating circumstance that the murder was committed for pecuniary gain. Weighing the aggravating and mitigating circumstances, it concluded the death sentence is justified because there are sufficient aggravating circumstances and insufficient mitigating circumstances.

Daugherty does not challenge his plea of guilty to the charges against him. The transcript of the plea proceeding evidences the voluntariness of his plea. In response to the trial court's inquiry, Daugherty stated that he was neither coerced nor compelled to plead guilty nor promised any leniency, gain, advantage, probation, or any other benefit to persuade him to plead guilty; that he fully understood the charges against him to which he pled guilty and the possibility of the imposition of the death penalty; and that he was also fully advised of all the rights he waived by pleading guilty. When asked during oral argument by this Court whether there was any question as to the voluntariness of Daugherty's pleas, Daugherty's counsel answered in the negative.

[1] Daugherty does challenge his death sentence. He contends that the court erred in allowing the State to present evidence of prior convictions as an aggravating circumstance where the offenses occurred subsequent to the capital felony for which he is now being sentenced and that the trial court erred in considering these prior convictions as an aggravating circumstance. He concedes, however, that we have resolved this argument against him in several recent decisions.

The State responds that not only have our decisions foreclosed this argument, but also Daugherty does not have standing to raise this point since one of the murders for which Daugherty was convicted was committed prior to the murder of Lavonne Sailer.

In *Elledge v. State*, 346 So.2d 998 (Fla. 1977), we rejected this same argument and held that it is clear from a reading of section 921.141(5)(b), Florida Statutes (1975), that the legislature referred to "previous convictions" and not to "previous crimes." Prior conviction, we emphasized, is the important element of this aggravating circumstance. *See also Lucas v. State*, 376 So.2d 1149 (Fla.1979). We likewise held in *King v. State*, 390 So.2d 315, 320 (Fla. 1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), that "[t]he legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." *See also Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

We hold that the trial court did not err in permitting the State to introduce these prior convictions and did not err in finding the aggravating circumstance that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

Daugherty also argues that the court erred in not considering certain mitigating factors. He initially contends that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. He asserts that the court erroneously premised its conclusion that this mitigating factor did not exist on the basis that Daugherty had been previ-

ously convicted of four murders. The court also noted that he had been convicted of three other robberies and two aggravated assaults. These crimes, states Daugherty, were committed after the Sailer murder. The State points out that one of these convictions was for a murder committed prior to the Sailer murder.

[2, 3] This prior conviction of the earlier committed capital felony is alone sufficient to negate the mitigating factor of no significant history of prior criminal activity. Moreover, in *Ruffin v. State*, we held that all of these prior convictions could be properly considered as a basis for rejecting this mitigating factor. In *Ruffin*, we said that "prior" means prior to sentencing of a defendant and does not mean prior to the commission of the murder for which he is being sentenced. We explained:

> The interpretation of "prior" advanced by Ruffin is unreasonable particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

397 So.2d at 283. Thus, we hold that the trial court properly rejected this mitigating factor. We further find no error in the court's rejecting the other statutory mitigating factors. Specifically as to other statutory mitigating factors, the trial court properly found:

> ....
>
> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> FINDING:
>
> The Court finds the defendant was not under the influence of extreme mental or emotional disturbance. The defendant, Daugherty, at his trial claimed he did suffer from headaches but at the time he killed the victim in this case he was not suffering from any headaches so the court did not consider this a mitigating circumstance.
>
> (c) Whether the victims were participants in the defendant's conduct or consented to the acts.
>
> FINDING:
>
> The victim did not participate in the conduct or consent to the acts.
>
> (d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.
>
> FINDING:
>
> The defendant was the main participant in the murder and was the one who actually fired the shots into the victim.
>
> (e) Whether the defendant acted under extreme duress or under the substantial domination of another person.
>
> FINDING:
>
> The defendant claimed that he was influenced by his traveling companion, Bonnie Heath. The Court determines that while Bonnie Heath was a participant in many of the crimes she was a small woman in comparison to the defendant and the defendant was not under the extreme duress or domination of Bonnie Heath.
>
> (f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.
>
> FINDING:
>
> The defendant had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

The evidence introduced at the sentencing hearing does not support a finding of any of these factors. Furthermore, the court did not err in rejecting the mitigating factor of age under the particular circumstances of

this case. At the time of this murder, Daugherty was 20 years old. As we said in *Peek v. State*, 395 So.2d 492, 498 (Fla.), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." We concluded in *Peek* that the trial court's rejection of age of 20 as a mitigating factor was supported by the record.

[4] Daugherty finally contends that the court erred in failing to find certain nonstatutory mitigating factors, *i.e.*, his alleged remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and the fact that at the time of sentencing, because of previous convictions, he would not be eligible for parole for 107½ years. Daugherty does not argue that the court failed to consider these circumstances or that it prevented him from introducing any relevant evidence of mitigation, nor would such an assertion be supported by the record. The court expressly stated that it considered and weighed all the testimony and evidence.

[5] We find no merit to this contention. The trial court considered all the evidence and decided that the death sentence was warranted since there were sufficient aggravating circumstances and insufficient mitigating circumstances. His conclusions are supported by the record. As we have previously stated, it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it. *Riley v. State*, 413 So.2d 1173 (Fla. 1982); *Smith v. State*, 407 So.2d 894 (Fla. 1981); *Lucas v. State*, 376 So.2d 1149 (Fla. 1979).

Accordingly, finding no error, we affirm.

It is so ordered.

ALDERMAN, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

DEPARTMENT OF TRANSPORTATION, State of Florida, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

HILLSBOROUGH COUNTY, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

CITY OF TAMPA, etc., Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

Nos. 61029, 61042 and 61053.

Supreme Court of Florida.

Sept. 14, 1982.

Action was brought against truck owner, Department of Transportation, Hillsborough County and City of Tampa to recover for personal injuries which plaintiffs sustained in intersectional motor vehicle collision. The Circuit Court, Hillsborough County, O. D. Howell, Jr., J., dismissed the governmental entities. The District Court of Appeal, 376 So.2d 296, reversed and remanded. On remand, the trial court again dismissed the governmental entities, and plaintiffs appealed. The District Court of Appeal, 400 So.2d 799, reversed and remanded. Applications for review were granted. The Supreme Court, Overton, J., held that: (1) failure to install traffic control devices and failure to upgrade an existing road or intersection, as well as decision to build a road or roads with a particular alignment, are judgmental, planning-level functions and absolute immunity attaches; (2) failure to comply with statutory standards and criteria for design, construction and maintenance subjects governmental en-

ORIGINAL 83-6281

No. 83 -

Supreme Court, U.S.
FILED
FEB 13 1984
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

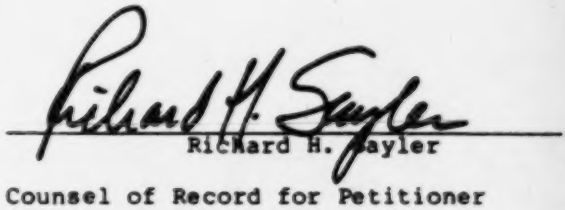
Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Pursuant to Rule 46 of the Supreme Court Rules, petitioner Jeffery Joseph Daugherty moves for leave to proceed in forma pauperis to petition for a writ of certiorari to review the judgment of the Florida Supreme Court summarily denying his petition for a writ of habeas corpus. Attached is an affidavit in the form prescribed by the Federal Rules of Appellate Procedure, Form 4, setting forth with particularity facts showing that petitioner comes within the statutory requirements. See 26 U.S.C. 1915. Petitioner was represented by appointed counsel in the trial court and on appeal to the Florida Supreme Court. Petitioner sought and was granted leave to proceed in forma pauperis in the habeas corpu proceedings in the Florida Supreme Court.

For the reasons stated and under the authorities cited above, petitioner prays that this Court grant the motion for leave to proceed in forma pauperis.

Dated: February 13, 1984



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Of Counsel:

Allan R. Freedman
Daniel J. Thomasch

DONOVAN LEISURE NEWTON & IRVINE

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FEB 15 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

- x

JEFFERY JOSEPH DAUGHERTY :

Petitioner, :

-against- :

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, :

Respondent.

- x

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, JEFFERY JOSEPH DAUGHERTY being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1974 or 1975, about 500.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ____ No X

   a. If the answer is yes, describe ech source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ____ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

---

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jeffery Joseph Daugherty
Jeffery Joseph Daugherty

STATE OF FLORIDA)
: ss:
COUNTY OF Bradford)

Subscribed and sworn to before me this the 19th day of January, 1984.

Bennie Hamrick
Notary Public

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 23, 1987

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 23, 1987

Supreme Court, U.S.
FILED
MAR 21 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-6281

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, et. al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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(904) 252-1067

QUESTION PRESENTED

Whether the Supreme Court of Florida denied Petitioner the right to due process under the Fourteenth Amendment to the United States Constitution in its review of Petitioner's conviction and sentence.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, et. al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

OPINIONS BELOW

The order of the Florida Supreme Court summarily denying Petitioner's Petition for Writ of Habeas Corpus is reproduced and attached in the appendix at (RA-1)*. The opinion of the Florida Supreme Court affirming Petitioner's sentence of death is reported at 419 So.2d 1067 (Fla. 1982). This Court's denial of Mr. Daugherty's Petition for Writ of Certiorari to the Supreme Court of Florida to review the decision on direct appeal is recorded at 103 S.Ct. 1236(1983).

JURISDICTION

Review is sought pursuant to 28 U.S.C. Section 1257(3).

*Page references to the appendix to this brief in opposition to Petitioner's Petition for Writ of Habeas Corpus are cited as "RA-."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioner contends that the Fourteenth Amendment to the United States Constitution and Section 921.141 Fla. Stat. are involved. Those provisions are set forth in the appendix at (RA-2).

PRELIMINARY STATEMENT

Petitioner alleges that the Florida Supreme Court's summary denial of his petition for writ of habeas corpus below raises an important question of federal constitutional law concerning the extent to which the denial of State-created procedural rights to specific capital sentencing protections implicates the due process provision of the Fourteenth Amendment. Specifically, Petitioner maintains that in this case, the Florida Supreme Court disregarded these procedures in three important respects. First, Petitioner alleges that the Florida Supreme Court failed to conduct any proportionality review of Petitioner's death sentence, either on direct appeal or during the habeas corpus proceedings which specifically sought such review. Second, Petitioner alleges that the Florida Supreme Court failed to conduct an independant reweighing of the statutory circumstances to determine whether the death sentence is genuinely supportable in this case. Thirdly, Petitioner alleges that the Florida Supreme Court failed to have before it and review the entire record on which the lower court based its decision to sentence Mr. Daugherty to death. Petitioner maintains that therefore, the court arbitrarily denied Petitioner the procedural safeguards afforded other capital defendants in Florida.

Respondents contend that the Florida Supreme Court did not fail to conduct a proportionality review of Petitioner's death sentence, either on direct appeal or during the habeas corpus proceedings. Secondly, Respondents submit that the Florida Supreme Court did conduct an independant review of the statutory circumstances to determine whether the death sentence

was genuinely supportable in this case. Third, Respondents submit that the Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner before the Supreme Court of Florida. Therefore, the court did not deny Petitioner the procedural safeguards afforded other capital defendants in Florida.

Respondents would point out that these very issues were raised in substance in Petitioner's first petition for writ of certiorari. In his first petition, Petitioner alleged that he was deprived of meaningful appellate review of his death sentence and that the Florida Supreme Court affirmed his sentence on the basis of an incomplete record. The Respondents argued that the Florida Supreme Court had a complete record before it regarding issues raised by Petitioner in his direct appeal. Furthermore, Respondents pointed out that Petitioner never moved to supplement the record before the court with these missing portions of the transcript provided by Rule 9.200(f), Florida Rules of Appellate Procedure. Additionally, Respondents pointed out that the issue of the missing portions of the transcript were never raised in Petitioner's direct appeal, and only presented "unseasonably late" in a motion for rehearing and clarification. Therefore, review by this Court was precluded. Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L. Ed. 2d 572 (1969), Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161 (1969) and Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981).

Petitioner further alleged in his first petition for writ of certiorari, that the Florida Supreme Court failed to conduct an independant review or to reweigh the evidence of the aggravating and mitigating circumstances to determine whether the imposition of the death penalty is warranted. Petitioner again realleges the same allegation as in the first petition, that the Florida Supreme Court failed to conduct an independant reweighing of the statutory circumstances to determine whether the death sentence is supportable in this case. Respondents pointed out that the court extensively reviewed

Petitioner's claim that the trial court erred in considering prior convictions for offenses occurring subsequent to the instant capital felony as an aggravating circumstance. The court pointed out that this argument had been rejected in previous cases, Elledge v. State, 346 So.2d 998 (Fla. 1977), Lucas v. State, 376 So.2d 1149 (Fla. 1979), King v. State, 397 So.2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed. 2d 825 (1981) and Ruffin v. State, 397 So.2d 277 (Fla. 1981) cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed. 2d 194 (1981). See Daugherty v. State, 419 So.2d 1067, 1069 (Fla. 1982).

On direct appeal, Petitioner further contended that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. Daugherty argued that the court erroneously concluded that this mitigating factor did not exist on the basis that Daugherty had previously been convicted of four murders. The trial court noted that Daugherty had also been convicted of three other robberies and two aggravated assaults. Daugherty contended that these crimes were committed after the Sailer murder. However, the state pointed out that one of these convictions was for a murder comitted prior to the Sailer murder. The Florida Supreme Court in its review of this allegation, examined its decision in Ruffin v. State, supra, in which the court held that these prior convictions could be properly considered as a basis for rejecting the mitigating factor. In fact, the Florida Supreme Court extensively reviewed the findings of the trial court regarding the absence of this mitigating factor, and the trial court's rejection of the mitigating factor of age, under the circumstances. See Daugherty at 419 So.2d 1070-1071. Therefore, Respondents submit that Petitioner was not denied an independant reweighing or review of the statutory circumstances to determine whether the death sentence was supportable in this case.

In Petitioner's first petition for writ of certiorari in this Court, Petitioner alleged that the review of his death

sentence was something less than what he was entitled to. Petitioner now alleges that the Florida Supreme Court failed to conduct any proportionality review of his death sentence, either on direct appeal or during the habeas corpus proceedings. Respondents argued in its brief in opposition to the first petition, that this Court should deny the petition on this issue in that the issue was never raised in the court below; and this Court had rejected the same issue in a petition for writ of certiorari to the Florida Supreme Court in Quince v. Florida, 414 So.2d 185, 198 (Fla. 1982), cert. denied, Quince v. Florida, _____U.S._____, 103 S.Ct. 192, 74 L.Ed. 2d 155 (1982). In Pulley v. Harris, _____U.S._____, [34 Cr.L. 3027], this court stated that:

> Needless to say, that some schemes for providing proportionality review are constitutional does not mean that such review is indispensable . . . examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.

Pulley v. Harris, at 34 Cr.L. 3029.

Nevertheless, Petitioner contends that the instant case is distinguishable from Pulley. Respondents contend that the question is whether a state that conducts proportionality review, despite the absence of a statutory requirement, denies a particular defendant equal protection when the court does not explicitly list in its opinion all other death cases the court compared with the instant case. Respondents maintain that this Court's decision in Pulley v. Harris, answered that question in the negative. Respondents maintain that the Florida Supreme Court did conduct proportionality review in its decision to affirm Mr. Daugherty's death sentence. Respondents further submit that the Florida Supreme Court conducts proportionality review in each case involving a death sentence, even if it does not explicitly list in its opinion each death case it compared with the instant case. See Messer v. State, 439 So.2d 875, 879 (Fla. 1983). Accordingly, the order of the Florida Supreme Court denying

Petitioner's petition for writ of habeas corpus should be affirmed.

STATEMENT OF THE CASE

Respondents do not accept Petitioner's statement of the case to the extent that it is unsupported by the record and is argumentative. While much of the procedural history of this case recounted by Petitioner would seem accurate, Respondents would take strong exception to the conclusionary statement that, "Nevertheless, on September 14, 1982, the Florida Supreme Court affirmed Petitioner's death sentence, Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982), on the basis of a record that did not include: (1) the trial court sentencing instruction to the jury, (2) arguments of counsel, (3) the jury voir dire, (4) Petitioner's taped confession which was played at the evidentiary hearing."

Respondents would point out that none of the issues in Petitioner's direct appeal involved the court's instructions to the jury, arguments of counsel, jury voir dire, or Petitioner's confession. Petitioner did not challenge the voluntariness of his plea or any confession in his direct appeal. See Daugherty v. State, 419 So.2d at 1069. In a motion for additional time in which to move for rehearing, Petitioner attempted to raise issues that were not raised in his direct appeal. Petitioner, in his first petition for writ for certiorari before this Court raised essentially the exact issues that are the subject of the instant petition. This Court denied that petition on February 22, 1983. See Daugherty v. Florida, 103 S.Ct. 1236 (1983).

Petitioner filed a petition for writ of habeas corpus with the Florida Supreme Court alleging the following:

> I. The court failed to conduct a constitutionally adequate review under the Eighth and Fourteenth Amendments.
>
> A. That the court failed to review the entire record on which the trial court based its decision to sentence petitioner to death.

B. That the court failed to reweigh the evidence of aggravating and mitigating circumstances and make an independent determination that the evidence supports the imposition of the death penalty.

C. That the court failed to conduct any proportionality review.

II. That the court denied petitioner procedural rights under the due process clause of the Fourteenth Amendment by disregarding established procedures for appellate review of capital cases under Florida law.

A. The State of Florida has created rights to certain specific procedures for Appellate Review of capital cases.

1. Entire record.

2. Independent determination.

3. Proportionality review.

B. The state created rights to certain procedures for appellate review of capital cases invoke the procedural due process clause of the Fourteenth Amendment.

The Florida Supreme Court summarily denied the petition.

REASONS FOR NOT GRANTING THE WRIT.

I. The Florida Supreme Court did not deny Petitioner the right to due process under the Fourteenth Amendment in its review of Petitioner's death sentence.

In this Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976), this Court found Section 921.141, Florida Statutes, and all the provisions therein to be in harmony with the dictates of the United States Constitution. In this case, Petitioner is alleging the same grounds as previously alleged in his first petition for writ of certiorari before this Court. Petitioner alleges that the Florida Supreme Court affirmed his sentence of death without engaging in (1) proportionality review, (2) the court did not reweigh the evidence of aggravating and mitigating circumstances and make an independent determination, (3) the court did not review the entire record on which the lower court based its

decision to sentence to death.

A. The Supreme Court of Florida did not deny Petitioner State-created rights to certain specific procedures for Appellate Review of all capital cases.

1. Proportionality Review

Respondents contend that the Florida Supreme Court did not fail to conduct a proportionality review of Petitioner's death sentence, either on direct appeal or during the habeas corpus proceedings. Secondly, Respondents submit that the Florida Supreme Court did conduct an independent review of the statutory circumstances to determine whether the death sentence was supportable. Thirdly, Respondents submit the Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner before the Supreme Court of Florida. Therefore, the Florida Supreme Court did not deny Petitioner the procedural safeguards afforded other capital defendants in Florida.

The Supreme Court of Florida did not deny Petitioner any state created rights to certain specific procedures for appellate review of capital cases. See McCaskill v. Williams, 344 So.2d 1276, 1280 (Fla. 1977). See also Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert. denied, 454 U.S. 1,000 (1981). Respondents further submit that the Florida Supreme Court conducts proportionality review in each case involving a death sentence, even if it does not explicitly list in its opinion each death case it compared with the instant case. See Messer v. State, 439 So.2d 875, 879 (Fla. 1983).

In Pulley v. Harris, supra, this Court stated that, "Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensible. . . Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutionality requirement." Pulley v. Harris, 34 Cr.L. at 3029. Nevertheless, Petitioner contends that the instant case

is distinguishable from Pulley. Respondents contends that the question before this Court is whether a state that conducts proportionality review, despite the absence of a statutory requirement, denies a particular defendant equal protection when the court does not explicitly list in its opinion all other death cases the court compared with the instant case. Respondents submit that this Court's decision in Pulley v. Harris, answered that question in the negative. Respondents maintain that the Florida Supreme Court did conduct proportionality review in its decision to affirm Mr. Daugherty's death sentence. See Daugherty v. State, 419 So.2d 1067, 1069 (Fla. 1982). Respondents further submit that the Florida Supreme Court conducts proportionality review in each case involving a death sentence even if it does not explicitly list in its opinion each death case it compared with the instant case. See Messer v. State, 439 So.2d 875, 879 (Fla. 1983).

In Pulley v. Harris, this Court noted that in many of the decisions cited by Justice Stevens in his concurring opinion are decisions in which the Florida Supreme Court reversed the death sentence by examining the circumstances of the particular case; proportionality review would therefore have been superfluous. And the fact that in others the court was not explicit about comparative review does not mean none was undertaken. Messer v. State, 439 So.2d 875, 879 (Fla. 1983) (acknowledging proportionality review requirement, but rejecting "the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases"). Pulley v. State, supra, N.8 at 34 Cr.L. 3030.

In Proffitt v. Florida, and Gregg v. Georgia, 428 U.S. 153 (1976), this Court did not hold that comparative proportionality review is a mandated component of a constitutionally acceptable capital sentencing system. This Court's decisons recognized that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual jury's and judges.

Citing Zant v. Stephens, ___U.S.____ (1983), in Pulley, supra, the court stated that while emphasizing the importance of mandatory appellate review under the Georgia statute, we did not hold that without comparative proportionality review the statute would be unconsitutional. To the contrary, we relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence. (emphasis added). Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required. Pulley, supra, at 34 Cr.L. 3031.

Accordingly, Respondents submit that in a state that conducts proportionality review, despite the absence of a statutory requirement, does not deny a particular defendant equal protection when that court does not explicitly list in its opinion all other death cases the court compared to the instant case. Additionally, Respondents further maintain that if proportionality review is not constitutionally required of a state whose statute specifically provides for proportionality review, Gregg v. Georgia, and Zant v. Stephens; then there can be no basis for holding that comparative proportionality review is required in a state whose statute does not require proportionality review. Indeed, in Pulley, this court held; "There is thus no basis. . . for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Pulley, supra, at 34 Cr. L. 3031. Like the California statute in Pulley v. Harris, the Florida Statute does not require a comparative proportionality review or otherwise describe the nature of the appellate review. Accordingly, Pulley is dispositive of this issue before the court.

2. Independent Determination.

Respondents maintain that the Florida Supreme Court did conduct an independant determination of whether substantial competent evidence existed to warrant the imposition of the death penalty under the circumstances. In Petitioner's direct appeal, Petitioner claimed that the trial court erred in considering his prior convictions for offenses occurring subsquent to the instant capital felony as an aggravating circumstance. The Florida Supreme Court pointed out that this argument had been rejected in previous cases (citations omitted). See Daugherty v. State, 419 So.2d at 1069. Furthermore, in his direct appeal, Petitioner contended that the trial court erred in rejecting the statutory mitigating factor of no significant prior criminal activity. Petitioner argued that the trial court erroneously concluded that this mitigating factor did not exist on the basis that he had previously been convicted of four murders. The trial court noted that Petitioner had also been convicted of three other robberies and two aggravated assaults. Petitioner contended that these crimes were committed after the murder in the instant case. However, the state pointed out that one of these convictions was for a murder committed prior to the Sailer murder. The Florida Supreme Court in its review of this allegation, examined its decision in Ruffin v. State, supra, in which the court held that these prior convictions could be properly considered as a basis for rejecting this mitigating factor. In fact, the Florida Supreme Court extensively reviewed the findings of the trial court regarding the absence of this mitigating factor, and the trial court's rejection of the mitigating factor of age, under the circumstances. See Daugherty,419 So.2d at 1070-1071. Therefore, Respondents submit that the Petitioner was not denied an independent reweighing or review of the statutory circumstances to determine whether the death sentence was supportable in this case.

3. Entire Record.

Respondents submit that the Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner before the Supreme Court of Florida. In his first petition for certiorari before this Court, Petitioner alleged this very same issue, which was rejected by this Court in its denial of his petition for writ of certiorari.

Under Florida Law, an indigent defendant is entitled at State expense to only those portions of the transcript which relate to the assignments of error [Statement of Judicial Acts to be Reviewed] filed with the trial court. Cueni v. State, 303 So.2d 411 (Fla. 1st DCA 1974), cert. denied, 310 So.2d 738 (Fla. 1975), U.S. cert. denied, 423 U.S. 837, 96 S.Ct. 64, 46 L.Ed. 2d 56 (1975). In the instant case, Petitioner's statement of judicial acts to be reviewed does not assert any issues concerning voir dire, sentencing instructions to the jury, arguments of counsel, or Petitioner's taped confession, which was played at the evidentiary hearing. Additionally, counsel for Petitioner never moved to supplement the record with these missing portions of the transcript as provided by Rule 9.200 (f), Florida Rules of Appellate Procedure.

While it is clear that an indigent is entitled to a free transcript on appeal, See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the state is not obligated to automatically supply a complete verbatim transcript. See Draper v. Washington, 372 U.S. 487, 495-496, 83 S.Ct. 774, 779, 9 L.Ed. 2d 899 (1963). In Moore v. Wainwright, 633 F.2d 406, 408 (5th Cir. 1981), the court held Florida's procedure, which limits a defendants right to a free transcript to only those portions pertinent to the assignments of error, [now referred to as statement of judicial acts to be reviewed] is not in itself unconstitutional. The Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner in his direct appeal. Accordingly, the Court did not deny Petitioner the procedural safeguards afforded

other capital defendants in Florida.

B. Certain procedures for Appellate review of capital cases do not invoke the protections of the due process clause of the Fourteenth Amendment.

Respondents would agree that state statutes may create interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment. However, Respondents do not agree that the decisions of the Florida Supreme Court acknowledging proportionality review creates any interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment. Cases cited by Petitioner in support of his position involve state statutes creating procedural rights, and not decisional case law made in the absence of a statute. See Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980).

As in Pulley v. Harris, Section 921.141, Florida Statutes, does not require comparative proportionaltiy review or otherwise describe the nature of the appeal. It does provide that in the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating and mitigating circumstances in subsection (5) and (6). The purpose of Section 921.141 is to provide the trial court with a list of aggravating and mitigating circumstances in order for the court to engage in character analysis of the defendant to ascertain whether the penalty is called for in his or her particular case. See Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

The Florida Supreme Court's review of capital cases is to determine whether there was substantial, competent evidence to support the trial court's finding of aggravating circumstances, to determine whether the sentence of death is justified. The Florida Supreme Court conducts proportionality review as an additional safeguard against arbitrarily imposed

death sentences. The Florida Legislature, contrary to Petitioner's allegation, has not created a right to proportionality review. Section 921.141, Florida Statutes provides for a bifurcated procedure and forcloses the death penalty unless the sentencing authority finds that at least one of eight statutory aggravating circumstances is present and is not outweighed by any mitigating circumstance. The Florida statute requires the sentencer (trial judge) to focus on the individual circumstances of each homicide and on each defendant. Proffitt v. Florida, supra, at 251. The function of the reviewing court, in this case the Florida Supreme Court, is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are supported by the record, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained. See Brown v. Wainwright, supra, at 1331.

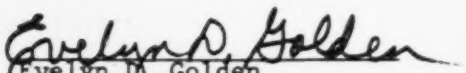
The fact that the Florida Supreme Court undertakes proportionality review is a good practice, however, this practice does not rise to the level of a state statute, and therefore it does not invoke the protections of the due process clause of the Fourteenth Amendment. As in Pulley, the Florida Statute does not require comparative proportionality review or otherwise describe the nature of the appeal. In Proffitt, this Court found that the Florida Statute provided meaningful appellate review. Therefore, this Court should deny Petitioner's petition for writ of certiorari to the Florida Supreme Court.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Respondents respectfully requests this Court deny Petitioner's second petition for writ of certiorari to review the judgment of the Florida Supreme Court summarily denying his petition for writ of habeas corpus.

Respectfully submitted,

Jim Smith
Attorney General



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NO. 83-6281

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, et. al.,

Respondents.

RESPONDENTS' APPENDIX

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EXHIBITS

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Fourteenth Amendment to the Constitution of the United States RA-2-2

Supreme Court of Florida

TUESDAY, NOVEMBER 15, 1983

JEFFERY JOSEPH DAUGHERTY, **

Petitioner, ** CASE NO. 64,489

vs. **

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, **

Respondent. **

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

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ATTORNEY GENERAL
DAYTONA BEACH, FLA.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

C
cc: Allan R. Freedman, Esquire
Richard H. Sayler, Esquire
and Daniel J. Thomasch, Esquire
Anthony P. Mario, Esquire
and Burton J. Green, Esquire
Hon. Jim Smith
Evelyn D. Golden, Esquire

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 268, ch. 19504, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 71-136.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8863(248); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 280a, ch. 19514, 1939; CGL 8426, 8427; CGL 1940 Supp. 8863(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In such case, the Department of Corrections may designate the correctional institution of the other jurisdiction as the place for reception and confinement of such person and may also designate the place in Florida for reception and confinement of such person in the event that confinement in the other jurisdiction terminates before the expiration of the Florida sentence. Upon imposing such a sentence, the court shall notify the Florida Parole and Probation Commission as to the jurisdiction in which the sentence is to be served. Any prisoner so released to another jurisdiction shall be eligible for consideration for parole by the Florida Parole and Probation Commission pursuant to the provisions of chapter 947, except that the commission shall determine the presumptive parole release date and the effective parole release date by requesting such person's file from the receiving jurisdiction. Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence. The Parole and Probation Commission may concur with the parole release decision of the jurisdiction granting parole and accepting supervision.

History.—s. 261, ch. 19554, 1939; CGL 1940 Supp. 8863(271); s. 124, ch. 70-339; s. 1, ch. 78-219; s. 24, ch. 79-3; s. 12, ch. 79-42; s. 1, ch. 79-310.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the sheriff shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-457; ss. 19, 35, ch. 69-106; s. 123, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 73-71; s. 14, ch. 77-120; s. 20, ch. 79-3.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

NO. 83-6281

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, et. al.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served Respondents' brief in opposition to petitioner's petition for a writ of certiorari upon counsel for petitioner pursuant to Supreme Court Rule 28 by placing a copy in the United States mail addressed to:

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Sid J. White, Clerk
Florida Supreme Court
Supreme Court Building
Tallahassee, Fl 32304

Done this 15th day of March, 1984.

Evelyn D. Golden
Evelyn D. Golden
Of Counsel

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